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No. 95-68

In The

Supreme Court of the United States

October Term, 1995

MARY CATHERINE BORELLI McNEIL, et al.,

Petitioners,

v.

OKLAHOMA CITY URBAN RENEWAL AUTHORITY, a public body corporate, et al.,

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court Of The State Of Oklahoma

RESPONDENT MIDWEST WRECKING COMPANY'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Your Petitioners' description of the "Proceedings Below" is adequate in the sense that it fairly describes the framework within which the dispute between the various parties has been litigated thus far.

However, Respondent, Midwest Wrecking Company, would additionally bring several matters to the attention of this Court which were rather ambiguously stated and/or not previously addressed at all.

It is undisputed that Co-Respondent, Oklahoma City Urban Renewal Authority ("OCURA") properly instituted a condemnation action against your Petitioners in the District Court of Oklahoma County, Oklahoma on January 23, 1990 (Case No. CJ-90-624).[1] In accordance with Oklahoma Statute, "Commissioners" were appointed to appraise the value of the property. The property was appraised and an award of $74,000.00 was placed with the Clerk of the District Court of Oklahoma County for the benefit of your Petitioners. Thereafter, OCURA contracted with this Respondent, Midwest Wrecking Company, a private company, to perform certain wrecking and removal duties on the subject property, all at the behest and direction of OCURA.

Subsequently, on September 21, 1992, Petitioners instituted a *separate* action regarding the necessity of the taking of the property by OCURA, as well as the amount of the award rendered by the Commissioners. Petitioners named OCURA, individual OCURA Directors, and Midwest Wrecking Company as Defendants in the action for trespass, constitutional violations, and civil rights violations.

All Defendants subsequently moved to dismiss Plaintiffs' 1992 action, claiming that Oklahoma law clearly prohibits institution of a separate, collateral action when a condemnation proceeding is pending. The trial court

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[1] OCURA's authority to exercise eminent domain powers is codified at 11 O.S. §38-101 et seq. and 66 O.S. §51 et seq.

agreed, and dismissed Plaintiffs' collateral action. Thereafter, the Oklahoma Court of Appeals affirmed the dismissal by Memorandum Opinion (the text of which is provided in Appendix B of Petitioners' Petition for Writ of Certiorari) and, ultimately, the Oklahoma Supreme Court denied Plaintiffs' Petition for Writ of Certiorari regarding the Court of Appeals affirmance of the trial court dismissal (provided in Appendix A of Petitioners' Petition for Writ of Certiorari).

As a result, the Oklahoma courts have unanimously agreed that Oklahoma law prohibits institution of a separate, collateral action regarding the taking of property pursuant to a condemnation action. Your Petitioners now ask this Honorable Court to grant certiorari on the grounds that they believe their constitutional rights have been violated by the dismissal (and subsequent affirmances) of their 1992 collateral action against OCURA, its directors and Midwest Wrecking Company.

Respondent, Midwest Wrecking Company, contends that no constitutional issues are raised by Petitioners herein and that Oklahoma statutory and decisional law strictly prohibit separate, collateral lawsuits arising from the same occurrence which was the basis of the original condemnation action.

SUMMARY OF THE ARGUMENT

Initially, Respondent, Midwest Wrecking Company, would state that the Petitioners have *wholly failed* to provide any "special and important reasons" why this Court should grant certiorari as required by the Rules of the Supreme Court of the United States, Rule 10.1. Each

Oklahoma Court which has addressed the matters at issue in this suit are in agreement; namely, that Petitioners have an adequate remedy under State law to seek redress for their claimed damages. Neither 42 U.S.C. §1983 nor the Fourteenth Amendment to the United States Constitution are violated by requiring Petitioners to seek their remedies in a single lawsuit. To be perfectly clear, Petitioners can either accept the award which has been placed with the Clerk of the District Court at the time of the condemnation *or* they can demand a jury trial regarding both the necessity of the taking of the property as well as the amount awarded for the property itself.[2] There are simply no constitutional issues raised herein.

Additionally (and again contrary to Petitioners' assertions) this is *not* a case of first impression for this Court. This Honorable Court has previously held in *Parratt v. Taylor*, 451 U.S. 526, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981) that where state law remedies are in place for property losses suffered (i.e., the pending condemnation action), no due process or other constitutional violations exist. In fact, the United States Government is empowered to acquire land (much like OCURA in the present matter) pursuant to 40 U.S.C. §258 "at any time before judgment" in a condemnation suit by depositing into court for the use of persons so entitled, an amount of money equal to the estimated value of the land.

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[2] Petitioners' complaint that the condemnation action is yet to be adjudicated is specious. Under Oklahoma Court rules, it is *Petitioner's* responsibility to demand jury trials and request that matters be set for trial. Petitioners herein have never requested a jury trial setting in the pending condemnation action.

In Oklahoma (as well as on the Federal level) an aggrieved condemnee is entitled to his day in court regarding any grievance he may have either as to the necessity of the taking or the amount awarded. However, the actions of a putative state actor (here OCURA) and a private contractor acting under the specific direction of the alleged state actor (here Midwest Wrecking Company) are *not* subject to collateral attack pursuant to the explicit holding in *Young v. Seaway Pipeline, Inc.*, 576 P.2d 1148 (Okla. 1977) which held that collateral matters regarding a condemnation proceeding *may not* be tried in the separate action, but must rather be tried in the condemnation proceeding itself.

As a result, Respondent, Midwest Wrecking Company, asserts that your Petitioners' remedy at law is both adequate and well-defined and that Petitioners' attempt to pursue a separate cause of action against this Respondent is utterly contrary to law and, since no constitutional violations exist thereby, this Court should deny Petitioners' Petition for Writ of Certiorari.

REASONS FOR DENYING THE WRIT

PROPOSITION I

PETITIONERS HAVE WHOLLY FAILED TO ARTICULATE ANY SPECIAL AND IMPORTANT REASONS FOR THE GRANTING OF CERTIORARI AS REQUIRED UNDER THE RULES OF THE UNITED STATES SUPREME COURT

Rule 10 of the Rules of the Supreme Court of the United States clearly states that a Petitioner shall establish *special and important reasons* for the granting of certiorari in a given case. Additionally, Rule 10 enumerates

several factors which are to be considered regarding the Court's discretionary power in either granting or denying certiorari. Among these considerations is whether a State Court of last resort has decided a federal question which has not been, but should be, settled by the United States Supreme Court. Rules of the United States Supreme Court, Rule 10.1(c).

In the instant case, Petitioners' allegations of constitutional violations do not begin to meet this criteria. For example, in *Parratt v. Taylor*, 451 U.S. 526, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981) (a case cited by Petitioners herein), this Court held in ruling upon a prisoner's complaint of deprivation of property under color of state law (§1983) that:

> Although the state remedies may not provide the Respondent with all the relief which may have been available if he could have proceeded under §1983, that does not mean that the state remedies are not adequate to satisfy the requirements of due process. *The remedies provided could have fully compensated the respondent for the property loss he suffered, and we hold that they are sufficient to satisfy the requirements of due process.*

Parratt at 101 S.Ct. 1917 (Emphasis supplied).

In the present case, Petitioners broadly assert constitutional violations of "due process". However, Petitioners fail to articulate any manner in which their present state law remedy is inadequate. Petitioners' only argument in this regard is that they cannot sue the individual OCURA board members and this Respondent, Midwest Wrecking Company, in a separate action for trespass and civil rights violations. In this, Petitioners are correct. However, this

does *not* mean that Petitioners are left without adequate remedy at law. It is in fact, *Petitioners* who want to "have their cake and eat it too". Petitioners do not want to pursue their claims in the condemnation action as provided by law. They want a *separate* action for trespass and constitutional rights violations which is simply prohibited by Oklahoma law and – law which is *not* in conflict with the United States Constitution or any decisions rendered by this Honorable Court. *All damages* to which Petitioners may be entitled are available through the condemnation action itself.

As a result, Respondent, Midwest Wrecking Company, respectfully requests that this Court deny Petitioners' Petition for Writ of Certiorari on the grounds that Petitioners have failed to establish "special and important reasons" for the granting of certiorari in this case as required by the United States Supreme Court Rules.

PROPOSITION II

PETITIONERS' STATE LAW REMEDIES ARE ADEQUATE AND NO CONSTITUTIONAL PROVISIONS ARE VIOLATED THEREBY

It has long been recognized by the Oklahoma Supreme Court that the condemnation procedure codified at 66 O.S. §§53 and 55 (as set out in Petitioners' Petition for Writ of Certiorari) afford the *only* forum and process to recover damages which may have resulted from a condemnation action. For example, in *Delhi Gas Pipeline Corp. v. Swanson*, 520 P.2d 670 (Okla. 1974), a pipeline company with the right of eminent domain filed a condemnation proceeding to acquire a right-of-way. On the

same day that the report of the commissioners was approved by the trial court, the condemnee filed a separate lawsuit against the condemnor and against the contractor hired by the condemnor to go onto the property for purposes of doing those acts of construction and/or demolition in furtherance of the condemnation plan.

In holding that the trial court had no jurisdiction to entertain the separate lawsuit maintained by the condemnee, the Supreme Court of Oklahoma noted at page 672:

> In *Graham v. City of Duncan*, Okl. 354 P.2d 458, we quoted the applicable rule from *State of Oklahoma v. Adams*, 187 Okl. 673, 105 P.2d 416, as follows:
>
> > " . . . the owner must recover in *one action*, 'all damages which have resulted, or are reasonably liable to result in the future, from a proper construction or operation of the improvement, and that no subsequent action will be to recover for items which might have been considered in the original proceeding.' " (Emphasis supplied)

Additionally, in *Young v. Seaway Pipeline, Inc.*, 576 P.2d 1148 (Okla. 1977), the condemnee commenced a separate action against the condemnor and other Defendants after the condemnor had instituted condemnation proceedings to secure a pipeline right-of-way across condemnee's land. The condemnee alleged violation of state and federal antitrust laws, abuse of process and trespass. In *Young*, the Oklahoma Supreme Court held that the authority of an entity to exercise the power of eminent domain *was part of a condemnation proceeding and could not*

be collaterally pursued in a separate proceeding. The *Young* Court also held that any damage for trespass had to be tried in the condemnation proceeding.

Here, your Petitioners are requesting that this Court grant certiorari for the purpose of declaring the holding in the *Young* case unconstitutional as being in violation of some unspecified constitutional right of the Petitioners. It is difficult to understand how Petitioners can claim prejudice, injury or violation of their constitutional rights when their remedy is clearly provided at law within the condemnation proceeding.

As further support, this Respondent would direct the Court's attention to an opinion written by Justice Stevens (then Judge Stevens) for the Seventh Circuit. In *Bonner v. Coughlin*, 517 F.2d 1311 (7th Cir. 1975), *modified en banc*, 545 F.2d 565 (1976), *cert. denied*, 435 U.S. 932, 98 S.Ct. 1507, 55 L.Ed. 2d 529 (1978), a prisoner alleged constitutional violations against prison officials for wrongful removal of the prisoner's property from his cell. The question presented was whether negligence may support a recovery under 42 U.S.C. §1983. In *Bonner*, the Seventh Circuit held at page 1319:

> For in a case such as this [state law] provides, in substance, that the Plaintiff is entitled to be made whole for any loss of property occasioned by the unauthorized conduct of the prison guards. We may reasonably conclude, therefore, that the existence of an adequate state remedy to redress property damage inflicted by state officers avoids the conclusion that there has been any constitutional deprivation of property without due process of law within the meaning of the Fourteenth Amendment.

Indeed, the United States Supreme Court has cited the *Bonner* case favorably in *Parratt v. Taylor, supra,* finding at 101 S.Ct. 1917:

> To accept Respondent's argument that the conduct of the state officials in this case constituted a violation of the Fourteenth Amendment would almost necessarily result in turning every alleged injury which may have been inflicted by a state official acting under "color of law" into a violation of the Fourteenth Amendment cognizable under §1983. It is hard to perceive any logical stopping place to such a line of reasoning. Presumably, under this rationale any party who is involved in nothing more than an automobile accident with a state official could allege a constitutional violation under §1983. Such reasoning "would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States". *Paul v. Davis,* 424 U.S. 693, 701, 96 S.Ct. 1155, 1160, 47 L.Ed. 2d 405 (1976). We do not think that the drafters of the Fourteenth Amendment intended the amendment to play such a role in our society.

It is well established that neither this Honorable Court nor federal courts below will countenance actions for constitutional violations where there exist, at law, adequate remedies for an aggrieved Plaintiff. As succinctly stated by the Eighth Circuit in *Edwards v. Arkansas Power & Light Co.,* 683 F.2d 1149, 1155 (8th Cir. 1982): " . . . due process entitles a landowner to nothing more than just compensation for the land taken . . . ".

Petitioners' cited authorities do not bolster their position. To the contrary, Petitioners' authorities militate in

favor of Respondents. In addition to *Parratt, supra,* Petitioners also cite *Hudson v. Palmer,* 468 U.S. 517, 104 S.Ct 3194, 82 L.Ed.2d 393 (1984) for the proposition that their remedy is inadequate. However, the *Hudson* Court ruled as follows at 104 S.Ct. page 3204:

> "we hold that an unauthorized intentional deprivation of property by a state employee *does not* constitute a violation of the procedural requirements of the due process laws of the Fourteenth Amendment if a meaningful post-deprivation remedy for the loss is available. (Emphasis supplied)

The rulings of this Court have been consistent: There is no violation of a due process right where the state provides a hearing to address Petitioners' claims. In this case, the condemnation proceeding is *precisely* the mechanism by which due process is afforded the Petitioners.

PROPOSITION III

RESPONDENT MIDWEST WRECKING COMPANY IS IMMUNE FROM LIABILITY UNDER SECTION 1983

It has been recognized that a private contractor (such as Respondent, Midwest Wrecking Company) cannot be held liable for any alleged procedural violations while acting under the direction of a condemning authority. For example, in *O'Grady v. City of Montpelier,* 474 F.Supp. 186 (D.Ver. 1979), a private contractor entered into a contract with the City to perform construction work on city streets. Plaintiffs brought an inverse condemnation suit against the contractor claiming (1) that the contractor violated the Plaintiffs' right to just compensation under the Fifth and Fourteenth Amendments of the United

States Constitution by causing damage to their property without payment, and (2) that the actions violated the Plaintiffs' due process rights because Defendants changed the road grade without meeting the notice and hearing requirements set forth in the Montpelier City Charter.

In addressing Plaintiffs' claims against the contractor, the Court stated at page 187:

> . . . [I]t is well established that such a cause of action will lie only against the public body or corporation authorized to exercise the power of eminent domain. An action for inverse condemnation *will not lie against a private contractor* who merely performs a construction contract for the government in accordance with authorized governmental specifications. (Emphasis supplied)

Additionally, the United States Court of Appeals for the Tenth Circuit has had an opportunity to address the efficacy of a claim against one who is acting under the direction of a putative state actor. In *McClelland v. Facteau*, 610 F.2d 693 (10th Cir. 1979), the Tenth Circuit held that a Defendant *cannot be liable* under a *respondeat superior* theory in a §1983 case. Since it has not been alleged (nor can it be proven) that Respondent, Midwest Wrecking Company, acted in any manner inconsistent with the specific direction of OCURA and as Petitioners have wholly failed to allege or identify any *independent* constitutional violation whatsoever on the part of Respondent, Midwest Wrecking Company, it *cannot* be liable under Petitioners' Constitutional claims.

Consideration should also be given to *Myers v. United States*, 323 F.2d 580 (9th Cir. 1963), where the Ninth Circuit denied any recovery against a defendant construction company stating at page 583:

> To the extent that the work performed by . . . [the contractor] was done under its contract with [the government], and in conformity with the terms of said contract, no liability can be imposed upon it for any damages claimed to have been suffered by the appellants.

Therefore, not only are Petitioners limited to asserting their claims in the subject condemnation action, Respondent, Midwest Wrecking Company, cannot be held liable *in any event* for performing functions under the direction and control of OCURA. When Petitioners claim that they have no remedy, what they really mean is that the remedy they have does not suit them. However, their remedy is, in all respects, constitutionally sound as it specifically allows Petitioners to address their concerns regarding both the propriety of the taking and the amount of the award *in* the condemnation procedure outlined in Oklahoma statutory and decisional law. To this, they are lawfully entitled, and, in this respect, Oklahoma law fully comports with all Constitutional requirements of due process alleged to be lacking by Petitioners herein.

CONCLUSION

Each Court which has addressed these Petitioners' claims has held that the owner of land which is to be condemned must recover in the condemnation proceedings all damages which have resulted, or are likely to result, in the future from the condemnation. The Courts have unanimously agreed that a subsequent action will not lie to recover for items of damage which might have been considered in the original proceeding. It has also been recognized that an agent who merely performed the construction contract cannot be held liable for any procedural due process violations allegedly committed by another.

The issues raised by Petitioners are neither novel nor of first impression. The decision of the Oklahoma Supreme Court in denying Petitioners' Petition for Writ of Certiorari is not in conflict with federal law nor do there exist any "special and important reasons" for the United States Supreme Court to address the propriety of the Oklahoma Supreme Court decision.

No matter the approach, the result is the same: Your Petitioners may recover any and all damages to which they are entitled in the pending condemnation proceeding. Oklahoma law does not permit a collateral lawsuit regarding these alleged damages. Petitioners can establish no constitutional violation occasioned upon them by the enforcement of the Oklahoma statutory and decisional scheme. As a result, Respondent, Midwest Wrecking

Company, respectfully requests that this Court enter an Order denying the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX A

40 U.S.C. §258(a) Lands, easements, or rights of way for public use; taking of possession and title in advance of final judgment; authority; procedure

In any proceeding in any court of the United States outside of the District of Columbia which has been or may be instituted by and in the name of and under the authority of the United States for the acquisition of any land or easement or right of way in land for the public use, the petitioner may file in the cause, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the lands described in the petition, declaring that said lands are thereby taken for the use of the United States. Said declaration of taking shall contain or have annexed thereto –

(1) A statement of the authority under which and the public use for which said lands are taken.

(2) A description of the lands taken sufficient for the identification thereof.

(3) A statement of the estate or interest in said lands taken for said public use.

(4) A plan showing the lands taken.

(5) A statement of the sum of money estimated by said acquiring authority to be just compensation for the land taken.

Upon the filing said declaration of taking and of the deposit in court, to use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the

use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest in accordance with section 6 of this Act on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the court. No sum so paid into the court shall be charged with commissions or poundage.

Upon the application of the parties in interest, the court may order that the money deposited in the court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in said proceeding. If the compensation finally awarded in respect of said lands, or any parcel thereof, shall exceed the amount of the money so received by any person, entitled, the court shall enter judgment against the United States for the amount of the deficiency.

Upon the filing of a declaration of taking, the court shall have power to fix the time within which and the terms upon which the parties in possession shall be required to surrender possession to the petitioner. The court shall have power to make such orders in respect of encumbrances, liens, rents, taxes, assessments, insurance, and other charges, if any, as shall be just and equitable.

(As amended Nov. 14, 1986, Pub.L 99-656, §1(1), 100 Stat. 3668)